



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Integrated Protection Systems, Inc.

File: B-254457.2; B-254457.3

Date: January 19, 1994

Lesli A. Derryberry for the protester.
Riggs L. Wilks, Jr., Esq., Joe E. Alford, Esq., and Wendy A. Polk, Esq., Department of the Army, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that bid which failed to include proof of possession of a specific license, as required under the invitation for bids, was nonresponsive is denied since the requirement pertained to responsibility and therefore could be satisfied at any time prior to award.

2. Although the apparent low bid on a contract for the installation, maintenance, and monitoring of an intrusion detection system is mathematically unbalanced, it is not materially unbalanced, and therefore nonresponsive, since the bid becomes low early in the contract term, including the option periods, and the agency intends to exercise all options.

3. The front-loaded installation bid price of a mathematically unbalanced bid for installation, maintenance, and monitoring of an intrusion detection system, in which the installation price is less than three times the government estimate and is not even two times greater than the protester's next low bid, is not so grossly front-loaded as to be tantamount to an improper advance payment that would require the rejection of the bid.

4. Protest that low bid should be rejected as nonresponsive because bidder did not submit with its bid descriptive literature that established that the offered equipment conformed to the specifications is denied where the solicitation did not require submission of descriptive literature and the literature submitted did not indicate that the bidder intended to qualify its bid.

DECISION

Integrated Protection Systems, Inc. (IPS) protests the award of a contract to Central Security & Electric, Inc. (CS&E) under invitation for bids (IFB) No. DABT39-93-B-0102, issued by the Department of the Army for installation, maintenance and monitoring of the intrusion detection system in 16 Army Reserve Centers in Arkansas.

We deny the protest.

The IFB, issued on June 29, 1993, contemplated the award of a firm, fixed-price contract for 1 base year and 4 option years. The IFB required bidders to submit prices for rental and maintenance of the intrusion detection system at 16 centers for the base year, as well as prices for these services over the 4 option years. The solicitation also required bidders to submit prices for installing the system at the 16 centers. Section C.5.4 of the IFB provided that installation should be completed "30 calendar days prior to October 1 or contract start date."

Section C.4.2.3.1 of the IFB required bidders to include a copy of their Arkansas license with their respective bids; section C.5.4.1.2 of the solicitation required them to submit "a detailed descriptive equipment list." Technical exhibit 4 of the solicitation contained the system's component list, which included the requirements that the key locks or key-operated switches used to protect enclosures be Underwriters' Laboratories (UL) listed and that the system's audible bell be self-powered by a battery source. By letter dated July 29, the agency advised bidders that the "contractor equipment list will provide the [g]overnment with information whether [the] potential contractor's equipment meet[s] contract specifications after the low bidder is established."

The Army received four bids by the August 25 bid opening date. CS&E submitted the low total bid (\$208,100) and IPS submitted the next low total bid (\$308,420). After receiving CS&E's verification that its prices were correct, the agency made award to the firm on September 13.

IPS contends that the award to CS&E was improper because the firm failed to submit, as required by the solicitation, a copy of its license with its bid documents. According to IPS, the Arkansas license requirement was an essential requirement that should have been fulfilled at bid opening as opposed to prior to award.

Generally, a solicitation provision like the one here, requiring a prospective contractor to obtain a specific license or permit, involves the firm's responsibility rather than the responsiveness of the bid, since it relates to the ability of the successful bidder to perform. United Int'l Investigative Servs., B-243720, May 6, 1991, 91-1 CPD ¶ 443. A requirement that relates to responsibility may be satisfied at any time prior to award. Norfolk Dredging Co., B-229572.2, Jan. 22, 1989, 89-1 CPD ¶ 62. Even though the solicitation stated that the license was required at bid opening, the terms of a solicitation cannot convert a matter of responsibility into one of responsiveness. Norfolk Shipbuilding & Drydock, B-248549; B-248549.2, Aug. 26, 1992, 92-2 CPD ¶ 127. Consequently, we have no basis to question the agency's decision to allow CS&E to submit proof of its license after bid opening.

IPS also contends that award to CS&E was improper because CS&E's bid is unbalanced. The protester asserts that CS&E's bid prices for the maintenance and monitoring work are understated and its bid prices for the installation work are overstated and do not reflect the work required. The protester also argues that since the performance of the installation work will be completed in the early stages of the contract, acceptance of CS&E's bid will obligate the government to make an improper advance payment.¹

The awardee's prices compared to the government's price estimates and the price range of the other bids received are as follows:

	<u>CS&E's Price</u>	<u>Government Estimate</u>	<u>Range of Prices of Other Bids</u>
Total Bid Price (Monitoring and Maintenance)	\$105,600	\$270,000 ²	\$192,190 - 418,000

¹An advance payment occurs when a payment under a contract to provide services or deliver an article is more than the value of the services already provided or the article already delivered. P&E Erection Co., B-234927, June 19, 1989, 89-1 CPD ¶ 574.

²Although the government estimate did not include option prices, this number is calculated based on the estimate of the base bid price (\$54,000) over the term of 4 option years.

Installation			
Price	\$ 93,500	\$ 31,600	\$ 52,502 - 81,900

An examination of bid unbalancing has two aspects. First, the bid must be evaluated mathematically to determine whether each item carries its share of the cost of the work plus overhead and profit, or whether the bid is based on nominal prices for some work and inflated prices for other work. Next, the bid must be evaluated to determine the cost impact of the mathematically unbalanced bid. Where there is reasonable doubt that award to the bidder submitting the mathematically unbalanced bid will result in the lowest ultimate cost to the government, the bid is materially unbalanced and may not be accepted. Federal Acquisition Regulation (FAR) §§ 14.402-2(g), 15.814, 52.214-10(e); Omega One Co., B-251316.2; B-251316.3, Mar. 22, 1993, 93-1 CPD ¶ 254.

The record shows that CS&E's bid price for monitoring and maintenance is significantly lower than the government estimate and the other bids received; CS&E's total bid price for this work was approximately 150 percent less than the government estimate and between 80 percent and 400 percent less than the prices submitted by the other offerors. On the other hand, CS&E's pricing for installation of the detection systems is more than two times greater than the government estimate and between 15 percent and 80 percent greater than the other bidders' prices. CS&E's bid thus appears to be mathematically unbalanced.

A mathematically unbalanced bid, such as CS&E's, can be accepted unless it is materially unbalanced, that is, unless there is reasonable doubt whether acceptance of the bid would result in the lowest overall cost to the government. DGS Contract Servs., Inc., B-245400, Dec. 30, 1991, 92-1 CPD ¶ 16. Our material unbalancing analysis focuses on various factors, including whether the government reasonably expects to exercise contract options, see G.L. Cornell Co., B-236930, Jan. 19, 1990, 90-1 CPD ¶ 74, and whether the bid is so extremely front-loaded that it does not become low until late in the contract term, including option years. See Residential Refuse Removal, Inc., 72 Comp. Gen. 68 (1992), 92-2 CPD ¶ 444.

CS&E's bid becomes low, relative to IPS's bid, in the sixth month of the first option year. The Army states that it intends to exercise all the options, and the record does not reflect circumstances suggesting otherwise. Thus, on this record there is no reasonable doubt that CS&E's bid will result in the lowest overall cost to the government.

Even where a mathematically unbalanced bid represents the lowest overall cost to the government, there are certain limited situations where it should not be accepted because it is grossly front-loaded and its acceptance would be tantamount to allowing an advance payment. See FAR § 52.214-10(e); Riverport Indus., Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, aff'd, B-218626.2, July 31, 1985, 85-2 CPD ¶ 108 (first article unit prices were \$185,000 and the production unit prices were \$250); ACC Constr. Co., Inc., B-250688, Feb. 16, 1993, 93-1 CPD ¶ 142 (line item bid price of \$2.2 million to \$3.2 million higher than the government's estimate and other bids); Islip Transformer & Metal Co., Inc., B-225257, Mar. 23, 1987, 87-1 CPD ¶ 327 (first article unit prices were \$15,000 and the production unit prices were \$408.90); Nebraska Aluminum Castings, B-222476, June 24, 1986, 86-1 CPD ¶ 582, aff'd, B-222476.2, Sept. 23, 1986, 86-2 CPD ¶ 335, reaff'd, B-222476.3, Nov. 4, 1986, 86-2 CPD ¶ 515 (first article unit prices were \$22,510 and the production unit prices were \$19.17); Edgewater Mach. & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630 (first article unit prices were \$125,000 and the production unit prices were \$301).

Front-loaded bids that are not grossly front-loaded may be accepted, however. See Aydin Corp., B-245461, Jan. 13, 1992, 92-1 CPD ¶ 51 (first article units priced approximately twice the production unit price); Dodge Romig Tex Corp., B-241810, Mar. 5, 1991, 91-1 CPD ¶ 246 (first article priced two to three times production unit price).

Here, CS&E's installation price is less than three times the government estimate and is not even two times greater than the protester's next low bid. We see no basis for finding gross front-loading in these circumstances.

IPS also speculates that CS&E will not successfully perform for the entire contract term, including option periods, because it will be operating at a loss. The protester claims that the agency is assuming a risk of nonperformance by CS&E because it is a "small company with presumably limited resources to perform services over a [5-]year period at prices below cost."

The ability of CS&E to perform the contract is a matter of responsibility, the agency's affirmative determination of which we will not review absent a showing of possible fraud or bad faith or that the solicitation contained definitive responsibility criteria that allegedly were not applied. 4 C.F.R. § 21.3(m)(5) (1993). Since IPS has not alleged, and there is no evidence in the record of, bad faith or fraud or the misapplication of definitive responsibility criteria, we will not consider the question of CS&E's

responsibility. See Lucas Place, Ltd., B-238008; B-238008.2, Apr. 19, 1990, 90-1 CPD ¶ 398.

IPS next argues that CS&E's bid was nonresponsive because the firm submitted commercial brochures (in response to the IFB's requirement for a detailed equipment list) which qualified its bid. The protester contends that these brochures show that the awardee's equipment does not offer two features called for by the IFB: an audible bell which is self-powered by a battery source, and key locks that are UL listed.

A bid may properly be rejected as nonresponsive if the bid, and the literature submitted with the bid, do not clearly show that the offered product complies with the specifications, provided that the IFB required submission of descriptive literature for use in evaluating bids. Data Express, B-243685, July 11, 1989, 89-2 CPD ¶ 28. In this case, the IFB had no such requirement.

In cases where descriptive literature is required for bid evaluation purposes, FAR § 14.202-5(d)(1) requires that the IFB clearly state what descriptive literature is to be furnished; the purpose for which it is required; the extent to which it will be considered in the evaluation of bids; and the rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature does not comply with the requirements of the invitation. National Elec. Constr., Inc., B-245943, Jan. 22, 1992, 92-1 CPD ¶ 102. The IFB here did not contain the standard descriptive literature clause which is required in solicitations that call for such information, see FAR § 14.201-6(p), and did not otherwise provide any of the information called for by FAR § 14.202-5(d)(1). It merely stated that bidders must submit a detailed equipment list.

In situations such as this, where the solicitation does not clearly describe the use and application of descriptive literature, any literature actually furnished need not address any specific requirement, but is treated as "unsolicited" literature in bid evaluation. See Aidco, Inc., B-249736; B-249736.2, Dec. 11, 1992, 92-2 CPD ¶ 407. Such unsolicited literature will cause a bid to be nonresponsive if it establishes that the bidder intended to qualify its bid or if the literature reasonably creates a question as to what the bidder is offering. FAR §§ 14.202-5(f) and 14.202-4(g); International Mailing Sys., Inc., supra; Brown Boveri Elec., Inc., B-209338, Apr. 1, 1983, 83-1 CPD ¶ 342.

With regard to the audible bell, the descriptive literature submitted by CS&E generally described its proposed bell in terms of its design and measurement, but was silent as to

whether the bell is self-powered. Unsolicited descriptive literature, however, need not show compliance with every specification requirement. For purposes of marketing strategy and economy, the descriptive literature of many vendors is not customized to each buyer's requirements, and thus the fact that literature submitted with a bid does not address each specification requirement does not establish that the bidder intends to not meet the requirement. In this respect, for example, the record shows that the descriptive literature submitted by IPS for the audible bell requirement, which was more detailed than CS&E's, is silent with regard to the IFB requirement for a maximum recharge time of 24 hours as well as other requirements.

As for the key locks on the system's control panel, technical exhibit 4 of the IFB required the key locks or key switches be UL listed. The key lock at issue here is part of the control panel. The manufacturer's literature CS&E submitted described its control panel. The literature stated that the manufacturer had applied for UL approval of the panel; it did not say whether or not the locks were UL-listed. We do not think this is sufficient to call into question CS&E's intention to comply with the requirement for UL listing of the locks.³

In short, since descriptive literature was not required, the failure of the literature that was provided to affirmatively show compliance with every specification requirement does not, under these circumstances, establish an intention to qualify the bid. See International Mailing Sys., Inc., supra.

The protest is denied.

Robert P. Murphy

Robert P. Murphy
Acting General Counsel

³The agency explains that the control panel--of which the lock is a component--in fact is UL listed. This assertion was confirmed by an inquiry by our Office to the manufacturer of the control panel proposed by CS&E as well as a letter from the manufacturer to the protester that was submitted with the protester's comments on the agency report. It thus appears that the manufacturer's literature submitted by CS&E simply has not been updated.